APPALASAMY SOMULOO

v.

BONG KIM CHUAN & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[ORIGINATING SUMMONS NO. P 26 OF 1984]
2 MAY 1985

CIVIL PROCEDURE**:** *Personal claims - Death caused by negligence of 1st named intended defendant - Solicitors for intended plaintiff not able to trace the insurers for 2nd intended defendant within time - Whether action time-barred - Whether Court has jurisdiction to extend time under s. 29(b) of Limitation Act.*

This was an application by the administrator of the estate of the deceased, the intended plaintiff, for leave pursuant to and for the purposes under the Limitation Act 1953 in respect of the intended action by the intended plaintiff against the intended defendants for damages for personal injuries occasioned to the deceased by reason of the negligence on the part of the 1st named intended defendant, the driver of the motor lorry owned by the 2nd intended defendant.

The solicitors for the intended plaintiff were not able to trace the insurers for the 2nd intended defendant after due enquiries had been made to the RIMV department and the police station where the report of the accident was made. The said solicitors managed to get the particulars of the 1st named intended defendant but were not prepared to proceed against him alone. The said solicitors then wrote to the Motor Insurance Bureau ("the Bureau") for particulars of the insurance cover. The Bureau then sent two circular to all its members requesting for the particulars of the insurers, and the said solicitors were told not to take any further action pending advice from the Bureau. By the time the Bureau managed to trace the insurers, the action was already time-barred.

The issue now is whether the Court has a discretion to extend time when the action is time-barred by reason of s. 6(1)(a) of the Limitation Act 1953 ("the Act").

Held:

[1] The solicitors for the intended plaintiff had taken every possible step to trace the identities of the registered owner of the motor lorry and of the insurers. Even the Bureau's two circulars had not met with any success. The insurers must have received a copy of Bureau's circulars but they chose not to come forward to admit that they were insurers of the motor lorry at the time of the accident. They played for time knowing too well that any claim against them would become statute barred. Such conduct can be considered as conduct amounting to a concealment of a right of action by the insurers under s. 29(b) of the Act as the insurers had deliberately concealed their identity to avoid being held responsible in damages in the event the intended plaintiff succeeds in his claim. In such a case, the limitation period only began to run after the intended plaintiff became aware of their identity and to that extent s. 6(1)(b) of the Act has no application to the facts of this case.

[2] As the facts of the application fell within s. 29(b) of the Act and since that section makes an exception that the 6 year limitation period does not apply, this application is allowed.

[Application allowed with costs.]

Cases referred to:
Beaman v. A.R.T.S. Ltd [1949] 1 All ER 465
Nathan s/o Arumugam v. Chin Jin Tse [1982] CLJ (Rep) 602
Lee Lee Cheng v. Seow Peng Kwang [1958] 24 MLJ

Legislation referred to:
Civil Law Ordinance 1956, s. 8(3)(b)
Limitation Act 1939 (UK), ss. 26(a), 29(b)
Limitation Act 1953, ss. 6(1)(a), 29, 29(b)

For the intended plaintiff - R.K. Nathan
For the intended defendants - Joga Singh

[**Editor's Note:** Appeal against this judgment is pending in the Supreme Court, vide Supreme Court Civil Appeal No. 8 of 1985]

JUDGMENT

Siti Norma Yaakob J:

This was an application by the Administrator of the estate of Ganapathy Rao s/o Appalasamy, deceased, the intended plaintiff, for leave pursuant to and for the purposes under the Limitation Act 1953 in respect of the intended action by the intended plaintiff against the intended defendants for damages for personal injuries occasioned to Ganapathy Rao s/o Appalasamy, deceased, by reason of the negligence on the part of the first named intended defendant, the servant or agent of the second name intended defendant.

The facts leading to the application were not disputed and they are set out in the supporting affidavit of Mr. Y.C. Lee, a partner of Michael Chen & Lee, the former solicitors of the intended plaintiff. On 6 January 1976, the deceased was involved in a motor accident with a motor lorry, BAA 6317, which resulted in his death. His father, the intended plaintiff, then instructed Mr. T. Selvendranathan an advocate and solicitor to pursue a claim for damages and pursuant to such instruction Mr. Selvendranathan wrote 2 letters. One dated 15 March 1976 was addressed to the Registrar and Inspector of Motor Vehicles, Selangor (RIMV, Selangor) applying for the names and addresses of the owner of motor lorry, BAA 6317, and its insurers at the date of the accident. In response to this letter, the RIMV Selangor, on 29 October 1976, wrote to the owner of the motor lorry one Mr. Tan Than Sang, calling upon him to submit the certificate of insurance in respect of motor lorry, BAA 6317, for perusal and for details to be recorded. This letter was copied to Mr. T. Selvendranathan with a note that the details of the insurance policy would be forwarded to him once they were supplied by the registered owner of the motor lorry. The second letter written by Mr. Selvendranathan dated 24 August 1976 was directed to the OCPD Petaling Jaya requesting a copy of the police report in respect of the accident and enquiring whether anybody had been charged in Court as a result of the accident and if so whether the details of such Court action could be supplied to him. On 6 September 1976, the OCPD sent a copy of the police report made by the first named intended defendant, the driver of the motor lorry at the time of the accident.

In early December 1976, the intended plaintiff changed solicitors and he retained Messrs. Michael Chen & Lee. Pursuing the matter from where Mr. Selvendranathan had left off, Mr. Y.C. Lee of Messrs. Michael Chen & Lee wrote to the owner of the motor lorry, Mr. Tan Than Sang of Chop Lai Hock Construction on 13 December 1976, requesting for particulars of the insurance cover but this letter was returned undelivered with words "Sudah Pindah". A search at the Business Registry drew a blank as no company by the name of Chop Lai Hock Construction had been registered with the Registry.

Mr. Lee also wrote 3 letters to the RIMV Selangor dated 14 December 1976, 5 January 1977 and 13 May 1977, requesting and reminding him to forward particulars of the motor lorry. There was no response to any of these letters and he learnt later that the file relating to the motor lorry had been burnt.

As the address of the first named intended defendant was not clear in the police report, Mr. Lee wrote to the National Registration Identity Card Department on 19 August 1977, requesting for full particulars of the first named intended defendant. In a letter dated 24 September 1977, the Registration Department informed him of the address of the first named intended defendant as Batu 4 1/2, Jalan Klang, Kuala Lumpur. At that stage, Mr. Lee was not prepared to proceed against him alone as the proper party to pay in the event of damages being obtained was the insurers and with this in mind, he renewed further his efforts to trace the identity of the insurers.

He wrote to the Motor Insurance Bureau, (the Bureau), for particulars of the insurance cover, outlining the steps that he had taken so far to trace the registered owner of the motor lorry and the identity of the insurers and appealing to the Bureau to supply him with the insurers' particulars. The Bureau took the matter up and issued a circular number 70/71 dated 20 September 1977 to all its members requesting *inter alia* the following particulars of motor lorry BAA 6317 (a) the name and address of the registered owner at the date of accident, (b) the insurance policy effective at the time of the accident. As there was no response to this circular, the Bureau issued another circular dated 18 November 1977 and when again nobody responded to it, the Bureau nominated an investigator in December 1978 to investigate into the case and specifically requested Mr. Lee not to take any further action pending advice from the Bureau, after investigations had been completed. It was only 3½ years later that he was informed by the Bureau by its letter dated 30 July 1982 that the owner of the motor lorry was Wong Lee @ Ng Lee T/A Ng Brothers, the second named intended defendant and that the insurers were the Netherlands Insurance Co. Est 1845 Limited. Mr Lee wrote to the insurers directly on 12 October 1982, enquiring them of their stand in the matter. By letter dated 2 November 1982, M/s. V.P. Nathan and Partners, solicitors for the insurers replied that they were looking into the matter before advising their clients with regard to liability. Then on 20 June 1983, the same firm of solicitors wrote to say that the claim of the intended plaintiff was time barred.

The only issue that was raised on this application was, has the Court a discretion to extend time? Under s. 6(1)(a) of the Limitation Act 1953, an action founded on a contract or on tort shall not be brought after the expiration of 6 years from the date of which the cause of action accrued. The intended plaintiff's cause of action arose on the day his son met with the accident on 6 January 1976 and it became statute barred 6 years later on 6 January 1982. However, s. 29 of the Act postpones the limitation period in either of the following 3 cases:

(1) where the action is based upon the fraud of the defendant or his agent or of any person through whom he claims as his agent, or

(2) the right of action is concealed by the fraud of any such person as aforesaid, or

(3) the action is for relief from the consequences of a mistake.

When any of the above situation arises, time only begins to run from the time the plaintiff discovers the fraud or the mistake as the case may be, or could with reasonable diligence have discovered it.

From the evidence it is abundantly clear that the solicitors for the intended plaintiff had taken every possible step to trace the identities of the registered owner of the motor lorry and of the insurers. All that they were able to learn was the identity, the first named intended defendant but they were not prepared to proceed against him singly as he was a man of straw. Moreover, in actions of this nature, as the pay master is invariably the insurers, their identity should be determined to answer the issue of liability as to damages. The police was not very helpful as the investigation officer had died and neither was the RIMV Selangor for that matter as the file relating to the motor lorry had been destroyed by fire. The solicitors could only rely on the Bureau's efforts and they were instructed not to take any further action. It was only after the Bureau's nominated investigator had started his investigations that the identities of both the registered owner and insurers surfaced. Before that even the Bureau's two circulars had not met with any success. The insurers must have received a copy of the Bureau's first circular sometime in October, 1977, and the second circular in November the same year but they chose not to come forward to admit that they were the insurers of the motor lorry at the time of the accident. They played for time knowing too well that any claim against them would become statute barred by 6 January 1982. Can such conduct be considered as conduct amounting to a concealment of a right of action by the insurers under s. 29(b) of the Act? I answered this in the affirmative as the insurers had deliberately concealed their identity to avoid being held responsible in damages in the event the intended plaintiff succeeds in his claim.

The same issue was raised in the case of *Beaman v. A.R.T.S. Ltd.* [1949] 1 All ER 465 where the defendants were bailees for the plaintiff of 4 cases containing chattels belonging to her. She was prevented by the war from returning to England to claim her property and in January 1940 wrote to the defendants from Turkey asking them to send the packages to her at Athens where she would go to collect them, but owing to the entry of Italy into the war, this became impossible. The defendants, being Italian-controlled, wished to close down their business and in August 1940, without informing the plaintiff, they examined the contents of the packages and deciding that they were worthless, gave them to the Salvation Army. It made no attempt then or subsequently to communicate with the plaintiff and made no entry in their books regarding what had been done to the goods. In 1946, the plaintiff returned to England and claimed the packages. On being informed of the true position, she sued the defendants for damages for conversion. The defendants pleaded s. 2(1)(a) of Limitation Act 1939 that the action was statute barred but the plaintiff contended that the limitation period had been postponed because the action was based upon the fraud of the defendants or the right of action was concealed by the defendants' fraud under s. 26(a) and (b) of the English Act. Denning J held there was no fraud within the meaning of s. 26 and that the action was barred. On appeal, the Court of Appeal held that the defendants' conduct in converting the plaintiff's chattels in breach of the confidence reposed in them and in circumstances calculated to keep her in ignorance of the wrong that had been committed amounted to a fraudulent concealment of the plaintiff's right of action within the meaning of s. 26(b) and allowed the appeal. The Court also held that "fraud" in s. 26(b) was not confined to fraud which was in its nature sufficient to give rise to an independent cause of action but had the same meaning in equity and there could be fraudulent concealment of a right of action which was not subsequent to the act which gave rise to the right of action but acquired its character from the manner in which that act was performed.

Section 26(b) of the English Limitation Act 1939 is in *pari materia* with our s. 29(b) and since I have already held that the insurers' conduct in keeping their identity unknown before the intended plaintiff's action had become statute barred amounted to a concealment of the

intended plaintiff's right of action, the limitation period only began to run after the intended plaintiff became aware of their identity in August 1982 and to that extent, s. 6(1)(b) of our Act has no application to the facts of the case before me. In declaring that the intended plaintiff's cause of action is not time barred, under s. 29(b), I do not consider that I have in effect extended the limitation period. It would have been so had this case not fallen within any of the situations envisaged by s. 29. If that had happened clearly, I would have acted well in excess of my jurisdiction as the Limitation Act does not make any provision giving me the necessary discretion to extend time. This application falls squarely on whether s. 29(b), applies as to prevent the intended defendants succeeding in their plea that the intended plaintiff's cause of action had become statue barred.

My attention was also drawn to 2 other cases, one being *Nathan s/o Arumugam v. Chin Jin Tse* [1982] CLJ (Rep) 602 where a similar application was made by an intended plaintiff who was represented by Mr. R.K. Nathan, the same Counsel representing the intended plaintiff in this application before me. Ajaib Singh J, in that case allowed the application but on appeal, the Federal Court reversed his decision. Unfortunately, no written judgment was handed by the Federal Court and there is no knowing upon what considerations the Court had arrived at its decision. However, Mr. Nathan who also appeared for the intended plaintiff in the appeal enlightened me that the Federal Court considered the application was unnecessary as the intended plaintiff suffered a disability in that he was an infant and time had not run against him. Section 29(b) was never considered by the Court.

In *Lee Lee Cheng v. Seow Peng Kwang* [1958] 24 MLJ the plaintiff applied that the time prescribed by s. 8(3)(b) of the Civil Law Ordinance 1956, be enlarged as to validate the proceedings he had brought against the defendant and alternatively to enable him to bring new proceedings to be instituted in respect of the same cause of action. Under s. 8(3)(b), no proceedings were maintainable against the defendants unless the plaintiff had commenced to institute proceedings not later than 6 months after he, the defendant, had taken out letters of Administration. In that case, the plaintiff was a week late and the Court held that it had no power to enlarge time as there was no express provision in the Courts Ordinance 1948 giving it the power. This case is distinguishable in that both the Civil Law Ordinance 1956 and the Courts Ordinance 1948 make no exception to the rule that in certain cases, time does not begin to run against a party with a cause of action as is found in s. 29 of the Limitation Act 1953.

As the facts of the application before me fell squarely within s. 29(b) of the Limitation Act 1953 and since that section makes an exception that the 6 year limitation period does not apply, I had allowed this application with costs.

Also found at [1985] 2 CLJ 134